IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 216 OF 1997

Shri Vishnu Tayappa Kamble
aged 40 years, Occ. service,
residing at L-50/1156, Maharashtra
Housing Board, Yerwada,
Pune 411 006. .. Applicant

Vs.

Abdul Rashid Abdul Hakim Ansari
aged 45 years, Occ. business
residing at 280, Guruwar Peth
Pune 411 042. .. Respondent

Mr. S.S. Hardikar for the applicant.
Mr. Pramod J. Pawar for respondent.

CORAM: B.H. MARLAPALLE, J.

Date : August 09, 2005.

ORAL JUDGMENT :

1. The revision applicant has assailed the order passed by the Competent Authority at Pune allowing the Application No.47 of 1996 filed under Section 13A(2) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (for short "the Bombay Rent Act").

The said application was filed on the ground that the period of licence had expired and, therefore, the landlord was entitled to the possession of the suit premises, namely, Flat No.L-50/1156, located on the ground floor, Survey No.191-A, on which the tenements were built by the Maharashtra Housing Board and it admeasured a total area of 21.08 sq.mtrs. The applicant-landlord claimed that the suit premises were given on leave and licence basis to the present petitioner since 1989 and the agreement was oral. The period of agreement was for 11 months. But as per the landlord the petitioner failed to vacate the premises after the expiry of 11 months and the occupant did not pay the licence fees after the expiry of the original licence period. Therefore, notice dated 1/8/1996 (Exh.16) was issued by the landlord. On the other hand, the contentions raised by the present petitioner in the Written Statement that he filed before the Competent Authority are that he was not a licensee but he was a tenant and he was paying monthly rent of Rs.400/-. He could not be evicted by filing an application under Section 13A(2) of the Bombay Rent Act, as he was not a licensee. He was occupying the

suit premises from 1986 and he had taken the premises on rental basis. The negotiations were held between the parties in the presence of Mr. Sapkal, the colleague of the petitioner. In addition, the monthly rental amount agreed, he had paid an amount of Rs.3000/- by way of deposit at the time of his induction in the suit premises. The applicant examined himself in support of his application, whereas the petitioner examined himself and his colleague Mr. Sapkal in support of his claim that he was not a licensee. The Competent Authority, after considering the rival contentions, the evidence adduced by the respective parties and the notice etc., held that the relationship between the applicant and the petitioner was that of licensor and licensee, the period of licence had expired and, therefore, the applicant-landlord was entitled for possession of the suit premises. Admittedly, there was no agreement signed between the parties granting licence to the petitioner. The landlord claimed that there was an oral agreement which has been disputed not only by the petitioner but also by Mr. Sakpal who came to be examined before the court below. The

applicant-landlord in his depositions before the Competent Authority stated in his cross-examination as under :-

> "I got the tenement in question from M.H.B. (Maharashtra Housing Board) Pune about 1 and half years prior to the induction of the opponent. I never resided in the tenement in question. My tailoring shop is on Laxmi Road, Pune. It is true that the opponent is serving as a teacher. I do not know if Supekar occupies another flat in the same building in which the premises in dispute is situate. The negotiations regarding the giving the premises to the opponent were held in my tailoring shop in the presence of myself, Sapkal, Opponent and two-three others."

1A. He has also admitted in his cross-examination that he did not remember the exact month in which the petitioner was inducted in the suit premises in the year 1989. He denied the suggestion that the

petitioner was occupying the suit premises right from 1986. Mr. Shrikant Sapkal in his depositions before the Competent Authority stated that towards the end of November, 1986, the petitioner and he had gone to the landlord and seen the suit premises. It was a Sunday when all the three met in the Tailoring shop of the landlord and it was agreed that the petitioner should pay Rs.3000/- by way of deposit and the rent payable was fixed at Rs.250/- per month. the petitioner started occupying the premises after payment of deposit amount to the applicant. Some times the witness used to pay rent on behalf of the occupant to the landlord and whenever the rent was not paid in time, the landlord made a grievance to the witness. His testimony remained intact as the cross-examination did not impeach the same in any way.

2. The record and proceedings called from the office of the Competent Authority at Pune has an application at Exh.14, which is a list of documents placed on record by the occupant-petitioner. The Competent Authority on 27/11/1996 has recorded

endorsement, "list of documents produced by opponent" on the said application. However, when the petitioner was in the witness box, his Advocate did not take appropriate steps to get all those documents proved before the Competent Authority and, therefore, in the impugned decision the Competent Authority has observed that the opponent failed to produce any document in support of his claim that he was not a licensee. Be that as it may, the moot question for consideration before the Competent Authority was, "Whether the applicant-landlord proved that the opponent-occupant was a licensee for a period of 11 months?".

3. The said issue is required to be examined in this revision application as well. As noted earlier, the relationship between the parties is not governed by any written documents and on the alleged oral agreement there is word against word so far as the applicant and opponent are concerned. Nevertheless, Mr. Sapkal, who was admittedly present at the time of negotiations between the parties, clearly stated before the Competent Authority that rent at Rs.250/-

per month was fixed and the occupant paid deposit of Rs.3000/-, in addition, the premises were occupied immediately after the deposit was paid. This independent witness has not supported the plea of licensee and on the contrary his depositions indicate that the petitioner was not inducted as a licensee.

4. Even in the absence of a written agreement, the relationship of licensor and licensee can be decided on the basis of the conduct of the respective parties and absence of such a written agreement by itself would not defeat the application filed under Section 13A(2) of the Bombay Rent Act. In the case of Associated Hotels of India Ltd. vs. R.N. Kapoor reported in **AIR 1959 SC 1262**, it has been held that there is a clear distinction between a lease and a licence and the dividing line is clear though sometimes it becomes very thin or even blurred. Following propositions shall be taken into consideration for determination of the distinction between a lease and a licence:-

(a) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form;

(b) the real test is the intention of the parties - whether they intended to create a lease or a licence;

(c) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and

(d) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant, but circumstances may be established which negative the intention to create a lease.

4A. In the case of Mrs. M.N. Clubwala and anr. vs. Fida Hussain Saheb and ors. reported in **AIR 1965**

SC 610, again the same issue i.e. the distinction between a lease and a licence fell for consideration. In para 12 of the said decision, Their Lordships observed thus :-

> "....Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement. In the absence, however, of a formal document the intention of the parties must be inferred from the circumstances and conduct of the parties."

4B. In the case of Sohan Lal Naraindas vs. Laxmidas Raghunath Gadit reported in **1971 (1) SCC 276**, a three Judge Bench held that crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject matter of the agreement and if it is in fact

intended to create an interest in the property, it is a lease, if it does not, it is a licence. In determining whether the agreement creates a lease or a licence, the test of exclusive possession, though not decisive, is of significance.

5. The Competent Authority appears to have shifted the onus of proving the relationship on the opponent. It held that Mr. Sapkal was a colleague of the opponent and, therefore, was an interested witness and on that ground his testimony was discarded. The Competent Authority also disbelieved his testimony on the count that with such a passage of time why should he remember the year in which the opponent was inducted and the terms thereof. As per the Competent Authority the clinching circumstance in favour of the applicant-landlord was the fact that even though the opponent had received the notice dated 1/8/1996 (Exh.16), he did not send any reply thereto. The opponent did not reply to the said notice and though it was stated in the said notice that he was inducted as a licensee for a period of 11 months, the opponent

kept quiet. The Competent Authority, therefore, held that the circumstances strongly went against the opponent on his story that he was inducted as a tenant. This approach of the Competent Authority is wholly erroneous. When the landlord approached the Competent Authority with an application under Section 13A(2) of the Bombay Rent Act, it was for the applicant-landord to prove that the opponent was inducted as a licensee and it cannot be shifted to the opponent in the absence of any written agreement governing the relationship. On this count alone the impugned order deserves to be quashed and set aside.

6. In his depositions, the landlord agreed that he was running a Tailoring shop on the Laxmi Road area, Pune City, far away from the suit premises and he was not staying even in the vicinity of the suit premises. The opponent used to go to the Tailoring shop for making the payments of monthly considerations. He also agreed that the opponent had paid deposit of Rs.3000/- at the time of induction. The landlord also failed to bring on record that the taxes in respect of the suit property were paid by

him. Nor there is any evidence to show that he had an access to the suit premises which was in exclusive possession of the opponent. The conduct of the parties as reflected in their evidence and more particularly in the evidence of Mr. Sapkal goes to show that the landlord failed to prove the relationship of licensor and licensee between himself and the occupant.

7. In the premises, this revision application succeeds and the same is hereby allowed. The impugned order passed by the Competent Authority is hereby quashed and set aside. The petitioner will continue to pay Rs.400/- per month to the landlord by way of monthly considerations. Rule made absolute in terms of the above order, but without any costs. Record and proceedings be returned to the court below forthwith.

(B.H. Marlapalle,J.)